

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
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)	
Bright House Networks, LLC)	CSR 6900-E
)	
)	
Petition for Determination of Effective)	
Competition in Carmel, IN and Indianapolis, IN)	

MEMORANDUM OPINION AND ORDER

Adopted: March 2, 2007

Released: March 5, 2007

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Bright House Networks, LLC (“Bright House”) has filed a petition with the Commission for a determination that its cable television system serving the Carmel, Indiana and Indianapolis, Indiana areas is subject to effective competition pursuant to Section 623(a) of the Communications Act of 1934, as amended,¹ and the Commission’s implementing rules,² and therefore is exempt from rate regulation. Bright House asserts that its cable system is subject to effective competition in these franchise areas under the “competing provider” test set forth in Section 623(1)(1)(B) of the Communications Act. The Consolidated City of Indianapolis (the “City”) filed an opposition with respect to the determination for the Indianapolis, Indiana franchise area only. No oppositions were filed with respect to the effective competition determination for the Carmel, Indiana franchise area.

II. DISCUSSION

2. Pursuant to Section 623(1) of the Act and Section 76.905 of the Commission's rules,³ it is presumed that cable systems do not face effective competition absent a demonstration to the contrary.⁴ Consequently, the cable operator bears the burden of rebutting the presumption that effective competition does not exist by producing evidence that shows effective competition is present within the relevant franchise areas.⁵

3. Section 623(1)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if its franchise area is (a) served by at least two unaffiliated multi-channel video

¹47 U.S.C. § 543(a).

²47 C.F.R. § 76.905(b).

³See 47 U.S.C. § 543(1) and 47 C.F.R. § 76.905.

⁴47 C.F.R. § 76.906.

⁵See 47 C.F.R. §§ 76.906 & 76.907.

programming distributors (“MVPD”), each of which offer comparable programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in the franchise area.⁶

4. Turning to the first prong of this test, DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in the franchise area are made reasonably aware of the service’s availability.⁷ The two DBS providers’ subscriber growth reached approximately 26.1 million as of June, 2005, comprising approximately 27.7 percent of all MVPD subscribers nationwide; DIRECTV has become the second largest, and EchoStar has become the third largest, MVPD provider.⁸ Because the two DBS providers have a nationwide footprint and serve well over 20 percent of all MVPD subscribers nationwide, we believe these statistics support the presumption that Bright House’s franchise areas are within their satellite footprint. In view of this DBS growth, and the data discussed below showing that more than 15 percent of the households in each of the Communities are DBS subscribers, we conclude that the population of the franchise areas may be deemed reasonably aware of the availability of DBS services for purposes of the first prong of the competing provider test.⁹ With respect to the issue of program comparability, we find that the DBS providers’ programming satisfies the Commission’s program comparability criterion because DIRECTV and EchoStar offer more than 12 channels of video programming, including more than one non-broadcast channel.¹⁰ Bright House has satisfied the first prong of the “competing provider” test by demonstrating that at least two unaffiliated MVPDs, namely DIRECTV and EchoStar, offer comparable programming to at least 50 percent of the households in the franchise areas.

5. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceeds 15 percent of the households in a franchise area. Bright House states that it is the largest MVPD provider in Carmel and that it is the second largest MVPD provider in Indianapolis, after Comcast.¹¹ Bright House provides 2000 Census data showing the number of households for the Carmel and Indianapolis franchise areas.¹² Bright House then compares the 2000 Census households for each franchise area with the households in each of the U.S. Postal zip code areas encompassing each franchise area, and allocates that proportion of the DBS subscribers within each such zip code to each franchise area.¹³ Bright House then compares the resulting numbers of DBS subscribers to the household numbers for each area to demonstrate that in each franchise area the DBS MVPD providers collectively have attained subscriber penetration levels in excess of 15 percent.¹⁴

⁶47 U.S.C. § 543(1)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

⁷ *See MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

⁸*See Twelfth Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 06-11, 21 FCC 2503 at ¶¶ 6, 13, 72-73 (rel. March 3, 2006).

⁹ *See* Petition at 8 and Exh. D.

¹⁰*See* 47 C.F.R. § 76.905(g); *see also* Petition at 5-6.

¹¹ Bright House states that it serves 15,257 subscribers in Carmel and that it serves 58,062 subscribers in Indianapolis. Based on records held by the City of Indianapolis, Bright House states that Comcast serves 125,143 subscribers in Indianapolis. Petition at 7 and Exh. A.

¹² Petition at Exh. C. Bright House states that there are 13,597 households in Carmel city, Indiana and 320,107 households in Indianapolis city (balance), Indiana.

¹³ Petition at 7-8 and Exh. E.

¹⁴ *Id.*

6. Bright House determines the DBS providers' subscribers using the five-digit zip codes identified by Media Business Corp. ("MBC").¹⁵ Bright House also purchased a Satellite Broadcasting and Communications Association ("SBCA") Effective Competition Tracking Report for the franchise areas reflecting the number of DBS subscribers within the zip code associated area.¹⁶ The data provided by Bright House indicates that the DBS penetration rate in Carmel, Indiana is 15.92 percent¹⁷ and the DBS penetration rate in Indianapolis, Indiana is 15.27 percent.¹⁸ The data for Carmel, Indiana is unopposed, and thus, we find that Bright House has satisfied the second prong of the competing provider test for the Carmel, Indiana franchise area.

7. While the City acknowledges in its opposition that Bright House Networks "has been granted county-wide operating rights,"¹⁹ it also argues that the Indianapolis, Indiana franchise area should be restricted to the areas that comprise the "Old City Limits" because Bright House has not extended its cable system beyond the "Applicable Franchise Territory" as set forth in the Franchise Agreement.²⁰ Therefore, the City argues that Bright House only should have included the zip codes within the Old City Limits, and not all of the zip codes located with Marion County: 46201, 46202, 46203, 46204, 46205, 46208, 46218, 46219, 46222, 46225, 46226, 46235.²¹ Based upon these zip codes, the City argues that Bright House has failed to meet the effective competition test.²² Bright House argues that the correct franchise area is the "consolidated City of Indianapolis," which consists of the historical boundaries of the City of Indianapolis and all of Marion County.²³

8. For purposes of the effective competition test, the Commission defines a "franchise area" as the area in which a system operator is granted authority to serve in its franchise.²⁴ The Commission has stated that a franchise authority may demonstrate that the franchise area is smaller if the cable system operator has made an affirmative decision to restrict service. Specifically, the Commission stated that a re-definition may be appropriate if the "system operator has itself, through its own conduct, self-defined the areas to be served to such an extent that this redefined area accurately portrays the operator's 'franchise area.'"²⁵ For instance, the Commission stated that one example of a situation in which use of a more restricted "franchise area" definition may be appropriate is when a system operator has county-wide

¹⁵ Petition at 7-8.

¹⁶ See Petition at Exh. D.

¹⁷ Petition at 8 and Exh. E (4770 DBS subscribers ÷ 29,963 Carmel households = 15.92%).

¹⁸ See Petition at 8 and Exh. E (58,227 DBS subscribers ÷ 381,380 Indianapolis households = 15.27%). In its Reply, Bright House updated its zipcode-by-zipcode DTH penetration figures from SBCA showing that the rate increased to 15.77% from 15.27%. Reply at 5. Because the City objects to the use of figures determined after the date that the Petition was filed, we will rely on the figures submitted with the original Petition. See Surreply at 4. Bright House relies on the subscribership of the DBS providers to satisfy the second prong of the competing provider test. Because Comcast is the largest Indianapolis MVPD, however, Bright House also provides data that includes its own subscribership in the penetration threshold calculation, which results in a 30.49% penetration rate (116,289 non-Comcast subscribers ÷ 381,380 Indianapolis households = 30.49%) Petition at 8 n.26 and Exh. E.

¹⁹ Opposition at 5.

²⁰ *Id.* at 4-5.

²¹ *Id.* at 6-7.

²² *Id.* at 9. When only considering the zip codes that comprise the Old City Limits, the City calculates that DTH penetration is between 12.68% and 13.48%, below the 15% threshold requirement.

²³ Reply at 2.

²⁴ *Implementation of Sections of the Cable Television Consumer Television Protection and Competition Act of 1992, Rate Regulation*, MM Docket No. 92-266, 9 FCC Rcd 1164, 1180 ¶ 24 (1993).

²⁵ *Id.* at 1181 ¶ 25.

operating rights but has determined to serve only a specific named community within that area.²⁶ The Commission also noted, however, that the fact that a franchise area has not as yet been filled out by construction of a system would not by itself be taken as redefining the service area.²⁷

9. The City has failed to submit evidence to show that the Indianapolis, Indiana franchise area should be restricted to the Old City Limits. The City itself acknowledges that Bright House has the authority to serve the entirety of Marion County. Therefore, the City must show that Bright House has made an affirmative decision to restrict service. Bright House asserts that it had not taken any affirmative actions to restrict the scope of its franchise area. In fact, Bright House states that it passes at least 4,041 homes and serves over 1,330 subscribers in five zip codes that are partially located outside of the Old City Limits.²⁸ We find that the City has failed to submit sufficient evidence in the record to demonstrate that Bright House has affirmatively redefined its Indianapolis franchise area.²⁹

10. The City also argues that of the 35 zip codes included in Bright House's calculations, nine of the zip codes are entirely outside the relevant franchise area (46278, 46250, 46256, 46236, 46229, 46231, 46259, 46113, and 46234) and 14 of the zip codes have geographic centers outside of Bright House's relevant franchise area (46214, 46217, 46220, 46221, 46224, 46227, 46228, 46237, 46239, 46240, 46241, 46254, 46260, and 46268). Thus, the City states that these 23 zip codes should be excluded from the Commission's consideration.³⁰ We disagree. As discussed above, we find that the franchise area consists of the Old City Limits and Marion County. In its petition, Bright House states that the 35 zip codes used to determine effective competition were identified by MBC as the zip codes associated with the Indianapolis, Indiana Franchise area.³¹ While noting that the level of accuracy varies with respect to zip code areas, the Commission nevertheless accepts MBC's data as the best available source for determining DBS subscribership in zip code areas.³² In addition, we note that Bright House has used the five-digit zip code allocation formula that the Commission previously has accepted in decisions granting petitions seeking determinations of effective competition.³³ We find that the City has failed to provide sufficient evidence in this instance to persuade us to alter the Commission's previous conclusion.

11. Based on the foregoing, we concluded that Bright House has submitted sufficient evidence demonstrating that its cable system serving Carmel and Indianapolis, IN is subject to effective competition.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Reply at 3. Bright House states it provides service in the following zip codes: 46229, 46231, 46234, 46240, 46278.

²⁹ See *Cablevision of Paterson d/b/a Cablevision of Allamuchy*, 17 FCC Rcd 17239, 17241 ¶ 4 (2002).

³⁰ Surreply at 7.

³¹ Petition at 7 n.25.

³² *Falcon Cable System Company II, a California Limited Partnership, d/b/a/ Charter Communications*, 17 FCC Rcd 4648, 4650-51 ¶ 7 (2002).

³³ See Petition at 24; see also *Charter Communications Propoerties, LLC*, 17 FCC Rcd 4617, 4618-19 ¶ 5 (2002); *Charter Communications, LLC d/b/a Charter communications*, 19 FCC Rcd 7003, 7005 ¶ 5 (2004).

III. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED** that the Petition for Determination of Effective Competition in Carmel, Indiana and Indianapolis, Indiana Franchise Areas filed by Bright House Networks, LLC **IS GRANTED**.

13. **IT IS FURTHER ORDERED** that the certifications to regulate basic cable service rates granted to any of the local franchising authorities in the Carmel, IN and Indianapolis, IN Franchise Areas overseeing Bright House Networks, LLC **ARE REVOKED**.

14. This action is taken pursuant to delegated authority under Section 0.283 of the Commission's rules.³⁴

FEDERAL COMMUNICATIONS COMMISSION

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³⁴ 47 C.F.R. § 0.283.